80-1636

No.

Office-Supreme Court, U.S.
FILED
MAR 30 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RUDOLPH JAMES MAIO,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

PETITION FOR CERTIORARI

Of Counsel:
JOSEPH (SIB) ABRAHAM, JR.
505 Caples Building
El Paso, Texas 79901
(915) 532-1601

CHARLES LOUIS ROBERTS
Attorney of Record for
Petitioner
505 Caples Building
El Paso, Texas 79901
(915) 532-1601

SCOFIELDS' QUALITY PRINTERS, P.O. BOX 53096, N.O., LA. 70153 - 504/822-1611

QUESTIONS PRESENTED

I. Whether a law enforcement officer should be permitted to include his surmises and conclusions in a search warrant affidavit while withholding the actual facts form the magistrate.

II. Whether "good faith" of a law enforcement officer is a proper or even relevant criteria in a factual situation where a law enforcement officer has intentionally substituted his own conclusions and speculations in the place of much less favorable actual facts in a search warrant affidavit.

III. Whether law enforcement officers may resolve serious doubts as to whether a structure is a single residence or multiple residences against the Fourth Amendment rights and reasonable expectations of privacy of United States citizens without making further inquiry.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

CITATIONS TO OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED ... 2

STATEMENT OF THE CASE 3

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE GRANTED 10

I. Whether A Law Enforcement Officer Should Be Permitted To Include His Surmises And Conclusions In A Search Warrant Affidavit While Withholding The Actual Facts From The Magistrate 10

A. Reasons Why the Writ Should be Granted 10

B. The Factual Basis and Merits of this Particular Case 13

II. Whether "Good Faith" Of A Law Enforcement Officer Is A Proper Or Even Relevant Criteria In A Factual Situation Where A Law Enforcement Officer Has Intentionally Substituted

PREVIOUS PAGE WAS BLANK

TABLE OF CONTENTS (Continued)

Page

His Own Conclusions And Speculations In the Place of Much Less Favorable Actual Facts In A Search Warrant Affidavit 16

III. Whether Law Enforcement Officers May Resolve Serious Doubts As To Whether A Structure Is A Single Residence Or Multiple Residences Against The Fourth Amendment Rights And Reasonable Expectations Of Privacy Of United States Citizens Without Making Further Inquiry 17

CONCLUSION AND PRAYER 19

CERTIFICATE OF SERVICE 21

APPENDIX A 1a

APPENDIX B 17a

TABLE OF AUTHORITIES

Page

Cases:

Boyd v. *United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886) 20

Franks v. *Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) 11,12,17

Johnson v. *United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948) 11,18,19

Katz v. *United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) 18

United States v. *Dorsey*, 591 F.2d 922 (D.C. Cir. 1978) 18

United States v. *Esparza*, 546 F.2d 841 (5th Cir. 1979) 12,15

United States v. *Taylor*, 599 F.2d 832 (1979) 13

Other Authorities:

28 U.S.C. §1254(1) 2

Supreme Court Rule 22 2

United States Constitution
Fourth Amendment i,2,3,10,11,17,20

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

RUDOLPH JAMES MAIO,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

PETITION FOR CERTIORARI

The Petitioner, RUDOLPH JAMES MAIO, respectfully prays a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 25, 1980.

CITATIONS TO OPINIONS BELOW

The United States District Court for the Western District of Texas, El Paso Division, entered a judgment of conviction of this Petitioner on June 27, 1979, as to one count of assaulting a federal officer with a dangerous weapon, 18 U.S.C. §111, and one count of possessing marijuana, 21 U.S.C. §844. This conviction was made the subject of an appeal to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed this conviction on November 25, 1980, in an unpublished *Memorandum Opinion*, styled, *United States* v. *Maio*, 79-5376 (November 25, 1980). The opinion is reproduced herein as Appendix A. The Petitioner then filed a *Petition for Rehearing and Suggestion for Rehearing En Banc*, which was denied by the Fifth Circuit on January 28, 1981. This Order denying rehearing is reproduced herein as Appendix B.

JURISDICTION

The judgment of the United States District Court was affirmed by the United States Court of Appeals for the Fifth Circuit. The Petitioner's *Petition for Rehearing and Suggestion for Rehearing En Banc* was denied on January 28, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Supreme Court Rule 22.

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution, Amendment Four, reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This criminal case began with an investigation of this Petitioner and others conducted by the Federal Bureau of Investigation. On January 22, 1979, the federal agents applied for and secured a wiretap order pursuant to Title III, 18 U.S.C. 2511, et seq., to make a surreptitious entry and install electronic eavesdropping equipment at "7659B Barton Rd", which was allegedly inhabited by the Petitioner and one Ronald Paul Drummond, (RII 42; RI 199, 200). The surreptitious entry was made by F.B.I Agent James Beck on January 26, 1979 (RIII 68, 69). This entry into 7659B Barton was made through a door referred to in subsequent suppression hearings as "Door A", (RIII 85-86; see *Map*, Def. Ex. A). While checking out this residence[1], Agent Beck went through several rooms, including a living room, dining area, kitchen, and a bedroom, (RIII 86-90). While peering into the bedroom, F.B.I Agent Beck

1 This residence was later discovered to occupy only a part of the 7659B Barton structure and to be the separate residence of Ronald Paul Drummond, *United States* v. *Maio*, No. 79-5376, *Memorandum Opinion*, at p. 3a.

noticed a shotgun which appeared to have "too short" a barrel, (RIII 88-90).[2]

Later, after the implantation of the listening device on January 26, 1979, the federal agents decided that they were not overhearing all conversations on the premises, (RIII 171). Because of this, F.B.I. Agent Beck made a second entry into the premises at 7659B Barton on February 3, 1979, (RIII 171). This second entry was made through what was later described as "Door C", (RIII 90-92). During this second entry, Agent Beck encountered another set of rooms, including a kitchen, living room, dining room or den, and two bedrooms, which he had not encountered on his January 26, entry, (RIII 116). Agent Beck at this time suspected "something was amiss", and communicated his suspicion that the structure might be two residences to his supervisor, F.B.I. Agent Bob Martin, (RIII 116).

Externally, the F.B.I. Agents observed that the building had two separate driveways, (RIII 52). In addition, in telephoto surveillance photographs, two electronic meter boxes, one marked "Apt" and the other marked "House", were actually photographed, but were overlooked by the agents, (RIII 50-51). These two meters were also visible to the naked eye from the road

2 The weapon later recovered during the search turned out to have a short barrel, but "was of legal length", but Agent Beck was excused for his incorrect observation by the United States Court of Appeals, who noted "Agent Beck [was] not a gun expert", *Maio, Memorandum Opinion,* at p. 9a.

where much of the visual surveillance was conducted, (RIII 151). Although the agents had checked with the electric company to see if the Petitioner had a billing account, the agents failed to inquire as to multiple listings. Such inquiry would have shown two weparate accounts, (RIII 52, 56-58). The rental agency handling the premises would have provided two separate rental agreements and two separate billings, (RIII 14-16, 26-28).

Subsequent to the installation of the second electronic eavesdropping device on February 3, two conversations were overheard. The first conversation was overheard on February 3, in that portion of the structure which was the separate residence of the Petitioner, (RI 235-236; RIV 10, 15-18), and, in pertinent part, reads as follows:

MALE No, not me. Inaudiable (sic) . . . he's coming out and [expletive deleted] man. Ah, he's come around with that [expletive deleted] time stuff and ah . . .

MALE 2 Pretty good inaudiable (sic) . . . It's decent weed. It's better than decent. That the only [expletive deleted] thing thats available right now. There's some nice tails (ph) in there and it's almost, there's a little over a pound in this one. It's about

a pound and one ounce or one or two ounces, pound or one or two ounces, something like that. Ah, I tell you DRUMMOND, this is exactly how we done this [expletive deleted] album. I sold the [expletive deleted] out of weed to do it but [expletive deleted] it man, if that's what I got to do, I don't care anymore, man, I just know that like I said, we're gonna make it big.[3]

The second conversation overheard on February 4 occurred in that portion of the structure which was the separate residence of Ronald Paul Drummond, (RI 232-235; RIV 10-15), and, in pertinent part, reads as follows:

KK	Yeah and we're afraid to, we've got a gun, but we're afraid to open the bedroom door, and his canister is gone.
BIG UN	Canister?
KK	Yeah
BIG UN	What canister? Stash?
KK	Yeah[4]

3 The full text of this conversation appears in N. 2, *United States* v. *Maio, Memorandum Opinion,* at pp. 9a-11a.

4 The full text of this conversation appears in N. 2, *United States* v. *Maio, Memorandum Opinion,* at pp. 9a-11a.

After the interception of these two conversations, F.B.I. Agents Beck and Martin met with Jamie Boyd, United States Attorney for the Western District of Texas, and discussed their serious misgivings about whether the house was only a single residence and the two transcripts of the two conversations, (RIII 63, 104, 108, 116; RIV 11, 19; RVI 116, 169). After this discussion and approval by United States Attorney Boyd, no further investigation was initiated or authorized and the following search warrant affidavit emerged:

1. The serious doubts as to whether 7659B Barton was a single residence held by both Agents, (RIII 63, 104, 108, 116), *was transformed into;*

1a. "7659B Barton Street . . . which said residence" and other descriptive phrases indicating a single residence and no doubts about its status. (RI 84).

2. The shotgun which Agent Beck "thought" was too short, (RIII 90), was transformed into:

2a. ". . . That he did personally observe inside the premises known as 7659B Barton Street a sawed-off double barrel shotgun with barrels less than 18 inches in length . . .", (RI 84).

3. The February 4 conversation in which a party known as "KK" was overheard to say that the "stash" was gone, (RIV 15-18), *was transformed into:*

3a. " . . . He overheard that there is present a stash maintained for distribution in the residence . . .", (RI 85).[5]

4. The February 4 conversation in which marijuana was discussed and described, but in which no actual sale, price, etc., was mentioned, (RIV 11-15), *was transformed into;*

4a. ". . . Affiant received information . . . that . . . Ronald Paul Drummond purchased and received on the premises, a quantity of controlled substances from a third party [and] . . . that Ronald Paul Drummond thereafter secreted such said controlled substance, to wit: marijuana, on the premises at 7659B Barton Street, and Affiant has good reason to believe that the said controlled substances are still present upon said premises", (RI 85).

The above allegations, 1a-4a, made up the total probable cause for the search warrant affidavit, (RI 84-85), which was obtained on February 9, 1979 and executed on February 10, 1979. During the search on February 10, the F.B.I. agents executed a simultaneous entry[6] into "Door A" and "Door C" of the 7659B Barton structure, (RVI 129).

---

5 This is the only portion of the warrant dealing with that part of the 7659B Barton structure which was the separate residence of this petitioner, (RI 84-85, RIV 11-18).

6 Agent Beck explained that a simultaneous entry would be dangerous to the officers if they ran into each other in the structure, (RVI 221-222). Thus, the use if a simultaneous entry appears to be in conflict with the belief that the structure was a single residence.

Later, the evidence seized and the testimony of officers gained by their entry into both residences of 7659B Barton were utilized by the Government as virtually the sole evidence against this Petitioner, (RVI 1, et seq.). That evidence and testimony were the subject of several motions to suppress, which noted the false statements, half-truths, and conclusions in the search warrant affidavit, (RI 255, 256; RIV 1, et seq.), but after hearing such motions were denied by the District Court, (RI 227, 229).

Upon appeal, the Court of Appeals for the Fifth Circuit observed that the characterization of the structure as a single residence was "false", *Maio*, at p. 7a; but agreed with the "District Court finding of good faith", *Maio*, at p. 7a, and, therefore, held that the "statement was, at most, negligently included", *Maio*, at pp. 7a-9a. Regarding the short-barreled shotgun, the Fifth Circuit observed that the statement was "also admittedly false", but found "the statement was [not] included in the affidavit intentionally or with reckless disregard for the truth", *Maio*, at p. 9a, because "agent Beck [was] not a gun expert". In examining the overheard conversations, the Fifth Circuit admitted "that the conversations did not explicitly express the activity which is taking place", *Maio*, at p. 12a; however, the Court held that:

> . . . . we cannot say that the statements in the affidavit are false. If they are false, we surely cannot say they were included in the affidavit

intentionally or in reckless disregard for the truth. We agree with the district court's determination that the agent's investigation was pursued in good faith.

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE GRANTED

I.

Whether A Law Enforcement Officer Should Be Permitted To Include His Surmises And Conclusions In A Search Warrant Affidavit While Withholding The Actual Facts From The Magistrate.

A. *Reasons Why the Writ Should be Granted.*

The Petitioner feels that the question above deserves this Court's attention because the procedure sanctioned by the United States Court of Appeals for the Fifth Circuit in this cause is an indirect and devastating assault upon the Fourth Amendment and its requirements of the existence of probable cause and the judgment of a neutral magistrate in deciding whether such probable cause exists. Should law enforcement officers be permitted the license to withhold the actual facts observed or overheard and substitute their own opinions, speculations, and conclusions, then probable cause will become what law enforcement officers conclude or speculate that it is and the neutral magistrate will have the authority and discretion of a rubber stamp.

This Court has previously expressed its concern in this area of law by declaring that the judicial guarantee of the Fourth Amendment rights lies in that Amendment's requirement that the probable cause inquiry be conducted "by a neutral and detached magistrate instead of . . . by the officer engaged in the often competitive enterprise of ferreting out crime". *Johnson* v. *United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948). More recently, this Court reaffirmed this concern and highlighted the problem of an attack upon this judicial decision-making process through this vehicle of a search warrant affidavit which contained falsehoods:

> . . . because it is the magistrate who must determine independently whether there is probable cause, Johnson v. United States, 333 U.S. 10, 13-14, 92 L.Ed. 436, 68 S.Ct. 367 (1948); Jones v. United States, 362 U.S. 257, 270-71, 4 L.Ed.2d 697, 80 S.Ct. 725, 78 ALR 2d 233 (1960), it would be an unthinkable imposition upon his authority if a warrant affidavit, revealed after the fact to contain a deliberately or recklessly false statement, were to stand beyond impeachment. *Franks* v. *Delaware*, 438 U.S. 154, 165, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

Here, the law enforcement officers achieve the result feared in *Johnson* and *Franks* by substituting their much more favorable conclusions and speculations for the ac-

tual facts they observed. In effect, the officers acted as a "Pre-Magistrate", determining the probable cause decision through this substitution of speculation and conclusion in place of the actual facts before the question came before the actual magistrate. The Petitioner does not contend that there is no place in a search warrant for surmises, speculations, conclusions and interpretations as long as these statements are characterized as such and do not entirely supplant the actual facts. In *Franks*, the court also reaffirmed that a "warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter", *Franks*, 438 U.S., at 165. Conclusions and speculations do not equate with observed facts and circumstances; and their use as the whole body of the affidavit sounds a death knell for any independent decision by the magistrate.

The opinion of the Fifth Circuit in this case which gives explicit approval to this "interpretation", *Maio*, at p. 12a, is in conflict with opinions of other circuits. The Ninth Circuit has held that:

> Half-truths and misrepresentations as well as conclusory allegations can reduce the function of a magistrate to that of a rubber stamp upon the law enforcement officer's personal determination of probable cause.
> *United States* v. *Esparza*, 546 F.2d 841, 843 (5th Cir. 1979).

And the Eighth Circuit has similarly held that:

> . . . We cannot employ the means of a judicial derrick to move contraband goods into a given location where, as her, the support rests solely on a conclusion or a suspicion and is not founded on probable cause.
> *United States* v. *Taylor*, 599 F.2d 832 (1979), at 837.

B. *The Factual Basis and Merits of this Particular Cause.*

In the instant search warrant, there are obvious and glaring problems as to the allegations regarding the single residence status of the structure; the short-barrel shotgun; and the supposed marijuana transaction in which Ronald Paul Drummond supposedly buys marijuana, secretes it on the premises, and maintains it there for some five days. However, for the purposes of this Petition and as an illustration of the real problems of sanctioning law enforcement interpretations in lieu of facts, the Petitioner would concentrate on the "stash" is "gone" conversation,[7] which was transformed into an interpretation disguised as fact in the search warrant reading:

> . . . He overheard that there is present a stash maintained for distribution in the residence . . . (RI 85).

---

7 This is the only element of probable cause dealing with the Petitioner or his residence, (RI 84-85, RIV 15-18).

As to how this transformation was accomplished, F.B.I. Agent Beck explained at the suppression hearing that:

> Q. But don't they discuss the canister not being present, being gone?
>
> A. Yes, sir. They make the statement, 'His canister is gone'.
>
> Q. Have you ever gotten a search warrant on the basis of evidence that you learn is not there anymore?
>
> A. No, sir. The mention of a stash would imply to me that someone believed there were narcotics in that area.

The Fifth Circuit was more than charitable as to the possible interpretations of the "stash" is "gone" conversation:

> . . . The second conversation, heard from Maio's apartment, does say that the canister containing 'shakey's stash' is 'gone'. But this conversation can easily be interpreted to mean that 'the stash is not here now, but is should be because it is customarily kept here'.
> *Maio*, at p. 12a.

Petitioner finds it incomprehensible that a conversation that the stash is gone heard on February 3 could give probable cause or any cause to believe that such

evidence would be found in that residence six days later on February 9, which is the date of the application of the search warrant. However, the broader question suitable for resolution by this Court is whether a magistrate can be spared this thorny question by the intervention of a cooperative law enforcement officer who deletes the prickly facts and substitutes a bald conclusion: ". . . He overheard that there is present a stash maintained for distribution in the residence . . .", (RI 85), which virtually begs for the "rubber stamp" of a probable cause finding, *Esparza*, 546 F.2d at 843.

The Petitioner attempted to alert the Fifth Circuit to the dangers that such "interpretations" posed to the independent judicial determination of probable cause in his *Brief in Chief*, pp. 26-27, 33-34; in his *Reply Brief*, pp. 5-6, 7; and in his *Petition for Rehearing and Suggestion for Rehearing En Banc*, pp. 12-13; however, the Fifth Circuit ignored the issue. Instead, the Fifth Circuit sanctioned the procedure of utilizing interpretations as facts,[8] *Maio*, at p. 12a, because the Fifth Circuit avoided dealing with the consequences of such a policy, but it is hoped that this Court will take a more forthright approach and confront the issue.

---

8 Because of this, the Fifth Circuit never had to deal with the question that was withheld from the magistrate, that is, whether a February 3 conversation that the "stash" is "gone" could supply probable cause to believe that "there [was] present a stash maintained for distribution in the residence. . ." on February 9.

II.

Whether "Good Faith" Of A Law Enforcement Officer Is A Proper Or Even Relevant Criteria In A Factual Situation Where A Law Enforcement Officer Has Intentionally Substituted His Own Conclusions And Speculations In The Place Of Much Less Favorable Actual Facts In A Search Warrant Affidavit.

In this case, Agent Beck admitted that his interpretations were intentional, (RIV 11-18), and it is clear from the affidavit that the actual facts and conversations were not included, (RI 84-85).[9]

The Fifth Circuit held that these interpretations were in "good faith", and thus acceptable, *Maio*, at p. 12a. In a sense, the Petitioner does not quarrel with the premise that the speculations of Agent Beck were in good faith. After all, Agent Beck is a law enforcement officer, and a speculation is nothing more than a guess or a hunch. How could a law enforcement officer make a bad faith guess? Even more to the point, how could a defendant prove that a law enforcement officer made a bad faith guess? Good faith is largely irrelevant in a case like ours where the officer intentionally inserted his interpretations into the affidavit in lieu of the much less favorable actual facts, (RIV 11-18).

---

9 For instance, the transcripts of the conversations which were examined and discussed with the United States Attorney, (RIV 11), were not appended to nor recited in the affidavit, (RI 84-88).

Thus, the question is presented to this Court as to whether the "underlying facts and circumstances", *Franks, supra,* may be replaced by "good faith" speculations and guesses on the part of law enforcement officers. Such a question is important to the future of the Fourth Amendment.

III.

Whether Law Enforcement Officers May Resolve Serious Doubts As To Whether A Structure Is A Single Residence Or Multiple Residences Against The Fourth Amendment Rights And Reasonable Expectations Of Privacy Of United States Citizens Without Making Further Inquiry.

In this case, both agents admitted serious doubts about the supposed single residence status of the 7659B Barton structure, (RIII 63, 104, 108, 116), even to the point of bringing such doubts to the attention of the United States Attorney, (RIII 63, 104, 108). There was also very clear testimony that the agents made no further inquiry of investigation to resolve the matter, (RIII 116), nor did they present their doubts to the magistrate, (RI 84-85).

The Fifth Circuit held that:

> '. . . the "reasonable expectations of privacy" protected by the warrant requirement, in the context of subdivisions of single buildings, ex-

> tend as far as, but no further than, the police actually knew or should have assumed they extended." United States v. Dorsey, 591 F.2d 922, 929 (D.C. Cir. 1978). In this case, the government reasonably assumed that the house contained only one residence and was justified in requesting the warrant authorizing a search of the premises at 7659B Barton. *Maio*, at 13a.

It is the Petitioner's contention that this analysis, especially in the face of agents' admitted doubts,[10] turns *Katz* v. *United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), on its head. A citizen's reasonable expectation of privacy, as described in *Katz*, 389 U.S. at 351-352, is an objective standard. Constitutional rights cannot depend on the clearly subjective views of law enforcement alone, *Johnson, supra*. Under the Fifth Circuit's analysis, the situation would be even worse. Since the agents admitted to doubts, the extent of a citizen's reasonable expectation of privacy would only extend to that area the Government recognized as private beyond a doubt. In other words, doubts by Government agents as to whether a citizen had or did not have an expectation of privacy would be resolved against the citizen. Under this regimen, our reasonable expectation of privacy would be perilously limited.

---

10 *Dorsey*, cited as precedent by the Fifth Circuit, did not deal with a situation where the agents had reason to doubt or in fact did have doubts, *Dorsey*, 591 F.2d at 929-939.

This is a novel question never before considered by this Court.[11] In this age of "Apartmentized" older buildings and garage apartments, should a doubt as to whether an expectation of privacy exists be left to "the officer engaged in the often competitive enterprise of ferreting out crime", *Johnson*, 333 U.S. at 14; or should further inquiry or investigation by such officers be required. As it were, the magistrate was spared the burden of confronting this issue by the agents' thoughtful deletion of the problem facts and doubts from the affidavit.

CONCLUSION AND PRAYER

In 1886, this Court observed that:

> It may be that it is the obnoxious thing in its mildest and least repulsive form, but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction

---

11 This point was raised below in the Petitioner's *Brief in Chief*, at pp. 34-38; and in his *Petition for Rehearing and Suggestion for Rehearing En Banc*, at pp. 7-11.

> deprive them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. *Boyd* v. *United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, at 752 (1886).

Justice Bradley could have easily have had the procedures discussed here in mind when he made that observation. It seems a trifle to allow interpretations to replace actual facts in search warrant affidavits, but what is the end effect on judicial determinations of probable cause? Could this Court exercise its proper judicial role and fulfill its responsibilities if this Court was forced to rely on interpretations of the facts given by one side of a lawsuit and was denied access to the actual facts of record? The Petitioner hopes that this Court will confront this issue for the sake of his Fourth Amendment rights, as well as for our judicial system in general.

WHEREFORE, the above premises considered, the Petitioner prays that this Court grant a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

CHARLES LOUIS ROBERTS
Attorney of Record for Petitioner
505 Caples Building
El Paso, Texas 79901
(915) 532-1601

JOSEPH (SIB) ABRAHAM, JR.
Of Counsel
505 Caples Building
El Paso, Texas 79901
(915) 532-1601

CERTIFICATE OF SERVICE

The undersigned attorney of record for Petitioner, RUDOLPH JAMES MAIO, hereby certifies as follows:

(a) That I am a member of the Bar of the United States Supreme Court, and that I have duly served all parties required by the Rules of said Court to be served with the foregoing Petition for Writ of Certiorari, as hereinafter shown:

(b) That the names and addresses of the attorneys of record for the adverse party are as follows:

The Honorable Wade H. McCree, Jr.
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

LeRoy Morgan Jahn
Assistant U.S. Attorney
U.S. Attorney's Office
655 E. Durango Blvd.
Hemisfair Plaza
San Antonio, Texas 78206

(c) That on this day I served three printed copies of the foregoing Petition for Writ of Certiorari on the said Wade H. McCree, Jr., and the said LeRoy Morgan Jahn, attorneys for said respondent, by depositing same in the United States post office, with first class postage prepaid, properly addressed to said attorneys for Respondent at their said addresses.

EXECUTED this ____ day of March, 1981.

CHARLES L. ROBERTS
Attorney for Petitioner
505 Caples Building
El Paso, Texas 79901
(915) 532-1601

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 79-5376

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RUDOLPH JAMES MAIO,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

---

(November 25, 1980)

Before THORNBERRY, GEE and REAVLEY, Circuit Judges.

REAVLEY, CIRCUIT Judge:

The defendant, Rudolph James ("Shakey") Maio, was indicted and charged with assaulting a federal officer

while engaged in the performance of his official duties, in violation of 18 U.S.C. §111, and with possession of marijuana with intent to distribute, in violation of 21 U.S.C. §841(a)(1). Before trial Maio filed multiple motions to suppress evidence obtained through a search of his residence. The suppression hearing was consolidated with the suppression hearing in the companion case, *United States v. Drummond*, which we also review today. *See* ____F.2d____ The trial judge refused to grant the motion. Maio was then tried before a jury and convicted of the assault, and of the lesser included offense of simple possession of marijuana, 21 U.S.C. §844.

Maio now appeals the conviction. Although in his brief Maio brings ten issues on appeal, the substance of his complaint lies in four areas: (1) the motion to suppress; (2) the introduction of extraneous evidence at trial; (3) the court's handling of a juror who later declared misgivings about the guilty verdict; and (4) the sufficiency of the evidence. In each of these areas we affirm the action taken by the district court.

FACTS

On January 22, 1979, the district court entered an order authorizing federal agents to intercept oral and wire communication at 7659B Barton,[1] a residence in El

---

1 The letter "B" in the address 7659B Barton does not refer to an apartment within the house, but is the address of the entire structure. 7659A Barton is the house next door to 7659B.

Paso, Texas. The residence was occupied by Maio, Ronald Paul Drummond, and other members of the "Bandito Motorcycle Club", who were suspected of committing various ongoing offenses, including the sale of metamphetamines and cocaine and the attempted murder of an Assistant United States Attorney in San Antonio. A 36-page affidavit of an FBI agent, containing allegations from a confidential informant, supported the application for the wiretap order. The order authorized the agents to make up to five surreptitious entries into the residence for the purposes of surveying the premises and installing, maintaining, and removing the surveillance equipment.

Pursuant to the order, FBI Agent James L. Beck entered the house about 11:40 p.m. on January 26, 1979. He thought he was entering a single residence, but it was later determined that he had entered a small apartment within the house that was rented and occupied by Drummond. Maio rented and occupied the other larger part of the house which was not connected by doorway to Drummond's apartment. Using only a red lens penlight to see, Agent Beck walked through the apartment to see if anyone was there and to find the telephone. During the walk-through he did not open any closed doors because he did not want to wake anyone who may have been sleeping there. In the doorway to one bedroom, Agent Beck observed a plywood sheet nailed across the bottom of the doorway. Upon leaning through the doorway, Agent Beck noticed a shotgun, with a barrel that he thought

was shorter than the legal length of 18 inches, propped up against the wall. He then installed the eavesdropping device in the base of the telephone.

Agent Beck made a second surreptitious entry into the house on February 3, 1979 about 3:30 p.m. After monitoring the conversations heard through the listening device installed in Drummond's apartment, it became apparent that there was another telephone extension in the house which was not being monitored. The second entry was made in order to install a listening device on that other phone. Agent Beck entered the house through a different door than the one he entered before, and again conducted a walk-through of the residence. He found himself walking through rooms different from those he had seen on his previous visit. There was another kitchen, another living area and other bedrooms in this part of the house. Agent Beck admitted that he began to feel some doubt that the house contained only one residence, although he was not sure because, again, he did not open closed doors. He testified that, at the time, he thought there was probably a connecting doorway of some sort between the two living areas. While conducting the walk-through of these rooms Agent Beck found several guns in Maio's bedroom. He then installed the listening device in the telephone and left.

On February 9, 1979, FBI agents applied for and obtained a search warrant for the house. The affidavit recited that an informant had observed a sawed-off,

double barrel shotgun and numerous handguns in the residence. It also recited that the residence was under the control of Maio and Drummond, both officers of the local chapter of the Bandito Motorcycle Club. The affidavit stated that an informer had overheard a conversation between two occupants of the residence that a "stash" (narcotics traffickers' slang for a quantity of controlled substances) maintained for distribution was present in the residence. An informer also told the affiant that Drummond had purchased marijuana from a third party and secreted it in the residence at 7659B Barton. The affiant identified the confidential informant as Agent Beck who had seen the weapons when he made the entries to install listening devices pursuant to court order and had heard the conversations by means of those listening devices. Attached to the affidavit were two aerial photographs of the house, which appeared to be one residence. The house had one address, one mail box, and one telephone line. The only outward indicia that the structure contained two dwellings were separate utility meters, unnoticed by the agents, and two parking areas outside the house.

On February 10, 1979, the agents executed the search warrant. Agents entered two doors simultaneously — the ones previously entered by Agent Beck. The agents loudly identified themselves as they forcibly entered the house. Only then did they find out that the house actually did contain two separate residences.

Agent Beck led the party entering Maio's part of the house. He testified that upon entering Maio's bedroom, he saw Maio in bed with a young woman, both of whom were nude and under the bedsheet. Maio had a pistol pointed at Agent Beck, who told Maio to drop the gun. After a second agent pointed a riot gun at Maio, he threw down the pistol. Maio was arrested and more than half a pound of marijuana was seized, along with scales, smoking pipes and refining equipment.

At trial, Maio made a motion in limine to prohibit mention of the "Banditos" at trial. The trial court denied the motion, but sustained Maio's objections whenever the government attempted to inject the issue of the motorcycle club. The government was allowed, however, to introduce testimony of an FBI agent that in monitoring the wiretap he had heard several conversations in the house between individuals talking about drugs and other narcotics.

The Motion to Suppress

Maio's primary contention on appeal is that the district court erred in failing to grant his motion to suppress evidence obtained in the search executed pursuant to the search warrant. Maio contends that the warrant is invalid because the affidavit supporting the warrant contains various false statements that were included by the affiant either intentionally or with reckless disregard for the truth. If the defendant makes such a showing, the false material must then be exclud-

ed from the affidavit in determining whether the warrant is valid. If "the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." Franks v. Delaware, 438 U.S. 154, ____, 98 S.Ct. 2674, 2677 (1978).

Maio contends that there were four false statements in the supporting affidavit: (1) the premises contain only one residence; (2) the presence of a shotgun with a barrel shorter than the legal length of 18 inches; (3) the presence of a "stash"; (4) the presence of marijuana, purchased by Drummond and secreted on the premises. The last three statements were the bases for the determination of probable cause on which the search warrant was issued.

Obviously, the statement that the premises at 7659B Barton contained only one residence is false. The determinative question is whether that statement was included in the affidavit intentionally or recklessly. The district court found that this statement was, at most, negligently included, and we feel that the finding is clearly supported by the evidence.

Maio asserts that the evidence does not support the district court's finding of good faith on the part of the affiant. He points out that there were two separate driveways, and two separate and labelled electric meters on the side of the house, both indicating the

presence of two separate residences inside the house. After Agent Beck entered the house twice in order to install the listening devices, there was more reason to find that the agents knew there were two residences: Beck entered through two different doors and saw different living areas each time; he saw no common passageway or door connecting the two areas; and his map, which was obtained from a telephone installer, was found to be inaccurate. During the actual search the agents entered through both doors simultaneously, which Maio contends further supports a conclusion that the agents knew there were two residences.

The government contends that the agents never knew there were two residences until the premises were actually searched. They knew Maio and Drummond had shared an apartment before. The house had only one address, one mailbox, and one telephone line with one telephone and one illegal extension. Although Agent Beck had indicated some doubt that the house contained only one residence, he assumed that there was some internal access between the two residences. Neither the telephone installer nor a confidential informant had indicated that there were two residences. The only outward indicia of two separate residences in the house were the two electric meters which the agents had not noticed. Based on the available information, and mindful of the limited surveillance due to the secluded dead-end street on which the house was located, we agree with the government and the district court. The statement in the affidavit was false, but, at

most, negligently so. Even a negligently included false statement will not invalidate a warrant. United States v. Astroff, 578 F.2d 133 (5th Cir. 1978).

The statement that a sawed-off shotgun of illegal length was present in the premises is also admittedly false; the shotgun which was found during the search was of legal length. We do not believe, however, that the statement was included in the affidavit intentionally or with reckless disregard for the truth. This statement was based on Agent Beck's observation when he first entered the house on January 26 to install the listening device. It was very dark in the house and he used only a red lens penlight to help him see. He saw the gun leaning against the wall of the bedroom, but did not enter the bedroom to make a further investigation. Agent Beck is not a gun expert, and to him the gun seemed to be too short.

We now turn to the two statements concerning narcotics information. The affidavit states that Beck overheard conversations which showed that a "stash" of narcotics was maintained for distribution in the residence and that Drummond had purchased a quantity of marijuana from a third party. The transcripts of the conversations on which these conclusions are based are set forth at the margin.[2] Maio contends that these

---

2 Overheard conversation of February 4, 1979 in Ronald Paul Drummond's apartment:

MALE Come in . . . down Blackie, Blackie, it's alright boy. There's a boy, be a good boy, it's okay, okay, okay. (Dog barking)

MALE 2 Can I use your bathroom? inaudible [sic] . . .

MALE Door right to the right, right there.

MALE Other door!

MALE 2 Is there any coffee here?

MALE I think it's in the inaudiable [sic] . . .

MALE 2 I see you work out with bar bells [sic] too.

MALE No, not me. Inaudiable [sic] . . . he's coming out and [expletive deleted] man. Ah, he's come around with that [expletive deleted] time stuff and ah . . .

MALE 2 Pretty good inaudiable [sic] . . . It's [sic] decent weed. It's [sic] better than decent. That the only [expletive deleted] thing thats [sic] available right now. There's some nice tails (ph) in there and it's [sic] almost, there's, there's a little over a pound in this one. It's [sic] about a pound and one ounce or one or two ounces, pound or one or two ounces, something like that. Ah, I tell you DRUMMOND, this is exactly how we done this [expletive deleted] album. I sold the [expletive deleted] out of weed to do it but [expletive deleted] it man, if that's what I got to do, I don't care anymore, man, I just know that like I said, we're gonna make it big.

MALE You never know.

MALE 2 And you know who's gonna help us make it big? You guys.

MALE Well, I hope we can, man.

MALE 2 You have already.

MALE It ain't like I said an easy rider or bike or somebody. They'll buy it just because it's [sic] in there, you know.

MALE 2 Inaudiable [sic] . . . you guys say but it.

MALE Bikers are prejudice, [expletive deleted] anyway, you know, and ah, you know, they inaudiable [sic] . . . an easy rider and ah, hey, a check this [expletive deleted] out inaudiable [sic] . . .

MALE 2 But we wanted to use that ah, you know, that statement you made to me up there while we were taking the pictures. It was something

like ah, if you like blues brother, don't be a chump.

MALE Yeah.

MALE 2 You know, we want to use that ah out, on that picture coming out of your mouth, one of those little cartoon things.

MALE Um hum.

(End of Conversation)

Overheard conversation of February 3, 1979, occurring in Rudolph James Maio's apartment:

MALE Hello

FEMALE BIG UN?

MALE Yeah

FEMALE This is KK.

BIG UN Yeah

KK Hey, SMEDLEY and I just walked into the house.

BIG UN Yeah

KK And there's some strange coat here and the chair by the window is moved and SHAKEY's gun is lying on the counter, but its [sic] out in the den and it was in his bedroom with his door shut.

BIG UN Oh, yeah.

KK Yeah and we're afraid to, we've got a gun, but we're afraid to open the bedroom door, and his canister is gone.

BIG UN Canister?

KK Yeah

BIG UN What canister? Stash?

KK Yeah

BIG UN I was just talking to DRUMMOND, he's down at the Hondo Pass, uh,

KK Okay

BIG UN SHAKEY's pistol or?

KK Yeah, but it's [sic] not gone, it's [sic] just laying out in the den, like we, ah, a coat too, somebody's Navy coat, a Navy pea-coat.

BIG UN Okay, take the gun and the coat and get out of there right now.

KK Alright

BIG UN Come on over here.

(Tape Turned Off)

conversations do not support the conclusions that the agents drew from them. The district court recognized that the conversations did not explicitly express the activity which is taking place. The Court also recognized, however, that the agents listening to and interpreting the conversations are experts in narcotics investigation, proficient in understanding those conversations. The conversation overheard from Drummond's apartment does not show a consummated sale of marijuana because there is no mention of price, quantity or an exchange. But the conversation could reasonably lead an expert to the conclusion that a transaction was taking place and a large quantity of marijuana was being kept in the house. The second conversation, heard from Maio'd apartment, does say that the canister containing "Shakey's stash" is "gone". But this conversation can easily be interpreted to mean that "the stash is not here now, but it should be because it is customarily kept here." Therefore, we cannot say that the statement in the affidavit are false. If they are false, we surely cannot say they were included in the affidavit intentionally or in reckless disregard for the truth. We agree with the district court's determination that the agent's investigation was pursued in good faith.

Even if the warrant cannot be invalidated because of the supporting affidavit, Maio contends that the warrant is invalid as applied to him because there was not probable cause to search his part of the house. A search warrant issued for two residences used separately in the same building must delineate probable

cause for each. United States v. Hinton, 219 F.2d 324, 325-26 (7th Cir. 1955). The courts, however, have recognized that "the 'reasonable expectations of privacy' protected by the warrant requirement, in the context of subdivisions of single buildings, extend as far as, but no further than, the police actually knew or should have assumed they extended." United States v. Dorsey, 591 F.2d 922, 929 (D.C. Cir. 1978). In this case the government reasonably assumed that the house contained only one residence and was justified in requesting the warrant authorizing a search of the premises at 7659B Barton. The search of Maio's part of the 7659B Barton house, then, was valid. *See Dorsey*, 591 F.2d at 928-31.

The Extraneous Evidence

Maio argues that he was entitled to a mistrial because extraneous evidence concerning narcotics transactions conducted at Maio's residence was introduced. This testimony concerned conversations overhead by means of the electronic listening devices placed in Maio's phone. The trial court refused to grant the mistrial because this evidence was introduced as proper cross-examination in response to the prior questions asked by defense counsel. We agree.

Defense counsel, through direct examination, had attempted to create an impression that the wiretaps did not disclose any conversations concerning narcotics or narcotics distribution at Maio's house. The prosecutor

was entitled to contradict this false impression through testimony regarding the conversations that thad been overheard.[3] Further, the trial court carefully instructed the jury not to consider these conversations unless they were directly related to the charges against Maio. The defendant has not shown how he was prejudiced by the introduction of the testimony. Therefore, the denial of the motion for mistrial was proper.

The Inconstant Juror

Maio also asserts that the district court erred in failing to grant his motion for new trial based on allegations of improper influence on the jury. After the verdict was returned, a juror filed an affidavit stating that she had changed her vote to guilty because of intense pressure from the other jurors. Allegedly, the other jurors had argued that since Maio was a member of a motorcycle gang, he must be guilty of the assault upon the federal officer. The district judge conducted a hearing to determine if the jury had con-

---

3 Defense counsel asked:

Q Now, in all of the taps, in all of the oral communications, did you find any bit of conversation between . . . Mr. Maio and anybody for the distribution of marijuana?

A No, sir, we did not. However —

Q That's the answer to my question. Thank you, sir.

In cross-examination, the prosecutor elicited testimony that although Maio himself did not participate in the taped conversations, there were conversations between others "talking about coke, ashes and other different street names for narcotics."

sidered matters extrinsic to the evidence adduced at trial, to which the juror responded in the negative. Maio contends that the trial judge should have specifically asked her if the Banditos were discussed in the jury room. He also contends that the judge should have instructed the juror to contact others concerning the jury deliberations. We disagree.

The rule against impeaching a jury's verdict by testimony or information concerning the intrinsic thought processes of juror deliberations is well established. *See, e.g.*, Hyde v. United States, 225 U.S. 347, 384, 32 S.Ct. 793, 808 (1911); United States v. Gipson, 553 F.2d 453, 457 n.6 (5th Cir. 1977). The district judge here, in his questioning of the juror, was careful not to intrude into the thought processes of the jurors, while seeking to ascertain if any act of misconduct was committed. The judge plainly asked the question so that a layman could understand it,[4] and was satisfied with the juror's response.

When the court refused to instruct the juror to discuss jury deliberations with others, besides the court, he was merely invoking Local Rule 20 of the Western District of Texas which states:

---

4 The question asked the juror by the judge was:

The Court:	Were there any matters discussed in the jury room, other than the evidence that you've heard under this Court's direction?
The Witness:	No, sir.

> "No attorney or any party to an action or any other person shall himself or through any investigator or other person acting for him interview or examine or question any juror, relative, friend or associate thereof during the pendency of the trial or with respect to the deliberations or the verdict of the jury in any action except upon the leave of the Court granted on good cause shown."

The judge was emphatic that if the juror still was concerned about the jury deliberations, she should contact him rather than an attorney. We feel the judge's actions in this situation were proper.

Other Errors

Maio asserts error in the trial court's failure to instruct the jury as to his defense of acting in the defense of another. He also contends that the evidence is insufficient to sustain the guilty verdict on the assault charge and to rebut his self-defense theory. We have reviewed the record and find that the evidence introduced at trial fails to support either of these contentions.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Office of the Clerk

January 28, 1981

Gilbert F. Ganucheau
Clerk

TO ALL PARTIES LISTED BELOW:

NO. 79-5376 — U.S.A. v. RUDOLPH JAMES MAIO

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

/s/ LINDA JOHNSON
Deputy Clerk

cc: Charles Louis Roberts
LeRoy Jahn